

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 July 2014

Public Authority: North East Derbyshire District Council

Address: The Council House

Saltergate

Chesterfield

S40 1LF

Decision (including any steps ordered)

1. The complainant has requested information relating to the sale of a piece of land at Mickley. The council has publicly stated that the fee earned from the sale of the land was the equivalent of £200 000, however the complainant argues that the actual fee paid by the purchasers was only documented as £80 000. The complainant has asked the council to provide documentary proof that the fee which the council received was £200 000. The council, having dealt with numerous similar requests previously said that it has provided all of the information which it holds.
2. The Commissioner's decision is that the council has, on a balance of probabilities, provided all of the information which it holds to the complainant or his associates.
3. The Commissioner does not require the authority to take any steps.

Request and response

4. On 15 May 2014, the complainant wrote to the council and requested the following information:

"I continue to be unhappy with the council's response relating to the "interpretation" and "opinions" over the £200 000 which, according to [officer's name redacted] was obtained/received 'by a combination of cash and other value'.

I have been provided with 'interpretations' but not with actual documented evidence, which I have repeatedly requested...

...If the shop being provided by Wulf Investments was built as an asset of the council, this must be documented, but so far the council has not been able to provide such documentation over such a financial asset...

... Where is a written agreement between NEDDC and Wulf Investment's which quantifies a financial gain of £200 000 to NEDDC?

...The "relevant information" provided by NEDDC so far is not evidential but must be regarded as misleading and therefore as misinformation."

5. The council responded on 22 May 2014. It said that the request challenged the information provided previously to an original request which it had logged with the reference EIR 3542, which had been responded to by the disclosure of 13 documents. Thus the council considered this to be a review of its previous response. The reviewer then outlined that the complainant had received all of the relevant documentation from the council and referred the complainant to the Commissioner should he still be unhappy with its response.
6. The complainant wrote back to the council on 29 May 2014 stating that the documents which had been provided in response to EIR 3542 did nothing to confirm a financial benefit to the council of £200 000 and said that he would make a complaint to the Commissioner.

Scope of the case

7. The complainant contacted the Commissioner to complain about the way the request for information had been handled. The complainant was not the person who made the initial request however he provided evidence from the requestor that he was acting on his behalf. The Commissioner is also aware of a close relationship between the complainant and the

requestor over this issue previously and so he accepted that the complainant may act on behalf of the requestor.

8. The complainant's main concern is that he disputes that the information which he has been provided with details how the council has reached a figure of £200 000 for the sale of the land. He considers therefore that in order for the council to be able to justify that statement then further information must be held which can demonstrate it to be correct.
9. The Commissioner considers therefore that the complaint is that further information must be held by the council.

Reasons for decision

Is the information environmental information?

10. The Commissioner notes that the request relates to a financial transaction on the sale of land, for the purposes of developing the land and building a shop which the council had previously committed to.
11. As such the Commissioner considers that the development of the land was an integral part of its sale, and therefore the information requested falls within the definition of information provided in Regulation 2(c) of the EIR; it is information on a measure, activity or plan likely to affect the elements of the land and the landscape. It is therefore environmental information and falls to be considered under the EIR rather than under FOI.
12. For the absence of doubt however the Commissioner's decision in this case would be the same if the information were to be considered under FOIA. His decision would be that no information is held for the purposes of section 1 of the Act.

Background to the case

13. This is an unusual complaint in that complainant has previously had decisions against him by both the Commissioner and the First-tier Tribunal upholding the council's decision to declare requests he has made over the issue of the land sale vexatious. The complainant has also previously been put on notice by the Commissioner that he may refuse to consider further complaints from him about the same issue under his powers under Section 50(2) of FOIA. However the complainant in this case is acting on behalf of a different person, who actually made the request for information.

14. The Commissioner has little doubt that if this request had initially been made by the complainant then it would have been declared vexatious by the council.
15. Both the complainant and the initial requestor have made numerous requests to the council, and subsequent complaints about the issue of the sale of the land to the Commissioner previously. The complainant has been told by the council on numerous occasions that all information has been provided to him in response to his previous requests.
16. The council for its part recognises that the initial requestor is acting in conjunction with the complainant to continue a campaign requesting information on the sale of the land. Effectively they are acting as one to seek to obtain whatever information they believe the council should hold which will prove their suspicions are correct.
17. The council has expressed its concern to the Commissioner that he has allowed the complainant to represent the requestor given the previous warnings which he had issued to the complainant. Nevertheless the council did not deem the requestors' request vexatious and so the Commissioner must therefore considered this complaint accordingly.
18. However, given the situation, the Commissioner accepts that information previously provided to the complainant is effectively also information which has been provided to the initial requestor in this case due to their obvious and clear collaboration over the issue of the land sale.

Regulation 12(4)(a)

19. Regulation 12(4)(a) of the EIR states that a public authority may refuse to disclose information to the extent that does not hold any relevant information falling within the scope of the request.
20. In response to the initial request the council provided the requestor with 13 documents which it said constitutes all of the information which it holds which falls within the scope of the request. The council also states that it has previously provided all of the information which it holds in respect of the sale of the land at Mickley in response to previous requests from either the complainant or the initial requestor.
21. The complainant does not accept that the information provided to him justifies the explanations provided by the council as to how a figure of £200 000 was reached as value it received when selling the land. He considers that it is not true that it received a value of £200 000 through the transaction and that if it is, the council should be able to prove that to be the case.

22. It is important to note that the Regulations simply provide a right to request recorded information. It does not require the council to justify its previous statement if there is no information held which can do so. If the complainant is correct and the information does not provide evidence that the council's statement was correct, but it is nevertheless all of the information which the council holds the council will have complied with its duties under the Regulations.
23. Similarly, the Commissioner has no powers to investigate whether the council, or the complainant's version of events is correct. If the council cannot defend its statement the Commissioner cannot become involved in such a matter unless further information is held but has not been disclosed. The question for the Commissioner in this case is not therefore whether the information justifies the council's statement, but simply whether all of the information falling within the scope of the request has been disclosed to the complainant.
24. When the Commissioner receives a complaint that a public authority has not provided any or all of the requested information, it is seldom possible to prove absolutely that there is no further information held. The Commissioner will apply the normal civil standard of proof in determining the case, i.e. he will decide on the balance of probabilities whether the information is held. In applying this test the Commissioner will consider:
 - the scope, quality, thoroughness and results of the searches; and, or
 - other explanations offered as to why the information is not held.
25. Where the question is whether the council holds information or not the Tribunal has in the past outlined that where its searches are adequate the decision must be that the information is not held on a balance of probabilities. Even if further information might be held the Tribunal does not expect that an authority will search every scrap of paper it holds in order to determine whether further information is held or not. It expects that the authority will have carried out appropriate searches of the relevant areas to determine whether information can be found or not.
26. Through the past complaints and tribunal decisions the Commissioner is aware of the history of these requests and of the searches which have been carried out by the council for information relating to the sale of the land. The council has explained that the land was sold for a price of £80 000 in cash and that the remaining figure was partially made up through the development of a shop on the land by the company who bought it. The complainant says that the shop was never a council asset and that it cannot therefore be considered to be a figure which the council can

consider to be part of the fee which it received for the land. He has asked the council previously to provide documentary proof that the shop was a council asset and/or that the council received a value of £200 000.

27. The police have been called in review the sale of the land previously but were unable to find evidence of any fraudulent activity relating to the sale of the land.
28. In a previous case before the Tribunal it identified further information which had mistakenly been omitted from disclosure by the council, but the Tribunal then considered that with the disclosure of this all information had been provided.
29. In a further complaint to the Tribunal by the complainant, (EA/2013/0064, 0065, 0066, 0067), it considered the request to be manifestly unreasonable under Regulation 12(4)(b) and the tribunal stated:

"There is no evidence of wrong-doing and requests to the Council cannot bring forward information which the Council does not hold. Taking a broad view of these requests in their context it is clear that they can serve no proper purpose and are manifestly unreasonable...

...The processes of FOIA and EIR have gone as far as they can and they have disclosed nothing. There is no evidence to sustain [the complainant's] suspicions. The burden on the Council and its staff has been considerable, his attempts to get disciplinary action against officers is evidence of his unreasonable approach. No public interest is served by his requests."

30. The test which the Commissioner applies is whether 'on a balance of probabilities' any further information is held. The council does not therefore have to prove 'beyond a reasonable doubt' that no further information is held.
31. It appears clear from the above that the council has carried out significant searches for relevant information previously. The Commissioner has also found previously that all relevant information has been provided to the complainant in response to other complaints to hm. The Tribunal decision above is demonstrative that the searches which have been carried out were both adequate and appropriate.
32. The Commissioner is therefore satisfied that the council has previously carried out adequate searches of its records to identify relevant information. It has provided the information which it holds to the complainant. Whether the complainant accepts that information or not,

the information which the council has located which is relevant to his request through its searches.

33. The Commissioner accepts that information which has previously been disclosed to the complainant can also be considered to be information which has been disclosed to the initial requestor. Nevertheless the council considers that all of the information which was provided to the complainant previously has also been disclosed to the initial requestor in response to his requests.
34. Accordingly the Commissioner's decision is that on a balance of probabilities no further information is held. The council therefore correctly applied Regulation 12(4)(a).
35. Regulation 12(1) provides that where information is not held under Regulation 12(4)(a) then the authority is under a duty to carry out a public interest test. The test is whether in all the circumstances of the case the public interest in the exception being maintained outweighs the public interest in the information being disclosed.
36. In general this test serves little purpose where an authority can say categorically that no further information is held. However in this case there is merit to the test in that if the balance of the public interest lies in favour of information being disclosed then the council would be obliged to carry out further searches to identify whether any further information is held which it is not currently aware of.

The public interest test

The public interest in maintaining the exception

37. The central public interest in the exception being maintained in this case rests in the use of council resources which would be required to carry out further searches for information which may not in fact exist. As stated, the test to be applied is that no further information is held 'on a balance of probabilities'. The council does not need to prove beyond a reasonable doubt that it does not hold any further information.
38. The Commissioner must therefore consider whether the public interest in the potential to find further information is outweighed by the public interest in preventing the cost in time and resources searching for information which may not exist.
39. It is important to recognise that the council has carried out significant searches for the information previously, has been before the Tribunal outlining what information it has discovered and the searches which were carried out, and that the Tribunal itself is satisfied that requests

associated with this complainant which require further searches would effectively be vexatious.

40. It is also important to recognise that some councillors have questioned the sale and have also criticised a report produced by the chief financial officer after an investigation by him. The police have also been requested by councillors to carry out an investigation. Their position was outlined in the Tribunal decision EA/2013/0064, 0065, 0066, 0067 where it said that the council had informed it that the police had stated "

"At this stage the Police cannot categorically say that a criminal offence has not taken place. However after consultation with the authority we have not been presented with any evidence that indicates that a criminal offence has taken place".

41. All of the above would provide strong evidence that the council has not been able to find evidence of any further information being held, and that there is therefore little further public interest in requiring it to carry out further searches for the information.

The public interest in the information being disclosed

42. The complainant argues that the transaction (which took place in 2005/6) potentially involved fraudulent or inappropriate activity. He seeks evidence to demonstrate that the sale of the land was significantly undervalued, at the expense of the tax payer.
43. He also seeks evidence that he council has not provided accurate statements as to the value that it received for the land. He believes that the council did not receive the value of £200 000 as the council has said, but that it only received £80 000, which was the value in actual cash which the developer paid for the land.

Conclusions

44. Having considered the above the Commissioner must also take into account the burden in time and resources expended by the council to respond to his, and others requests over the issue, to respond to the Commissioner and also to the Tribunal previously. It has also expended time and resources responding to police inquiries and for the chief financial officer to consider and report on the sale. None of the above investigations have found evidence of fraudulent activity.
45. Given this the Commissioner is satisfied that the council has carried out appropriate searches for relevant information in the past, and that the public interest rests in maintaining the exception in Regulation 12(4)(a) in this instance.

Other Matters

- i. The Commissioner notes that in situations where a person has been warned by the Commissioner that a continuation of the pattern of behaviour which has led previously to requests being dealt with as vexatious may to an extent be overcome by others taking forward the complaint on his or her behalf, or even by the complainant simply using the identity of the individual when making further requests.
- ii. In this case the Commissioner has not taken issue with the complainant acting on behalf of the requestor, nor of the requestor continuing with the line of questioning followed previously by the complainant.
- iii. The complainant should note however that both the authority and the Commissioner are able to take into account such factors and may still deem requests to be vexatious where they form part of a clear collaborative campaign by a small number of individuals.
- iv. The Commissioner therefore wishes to highlight to both the complainant and the requestor that he is able to refuse to consider requests under section 50(2)(c) of the Act where it appears to him that the request and/or the subsequent complaint are made in a manner which is purposely intended to avoid falling within the criteria stipulated in Section 50(2)(c).

Right of appeal

46. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

47. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
48. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Andrew White
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